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In The

Supreme Court of the United States

October Term, 1974

No. 74-751

JAMES D. COX, [illegible], ET AL.,

Petitioners,

v.

JAMES R. COOK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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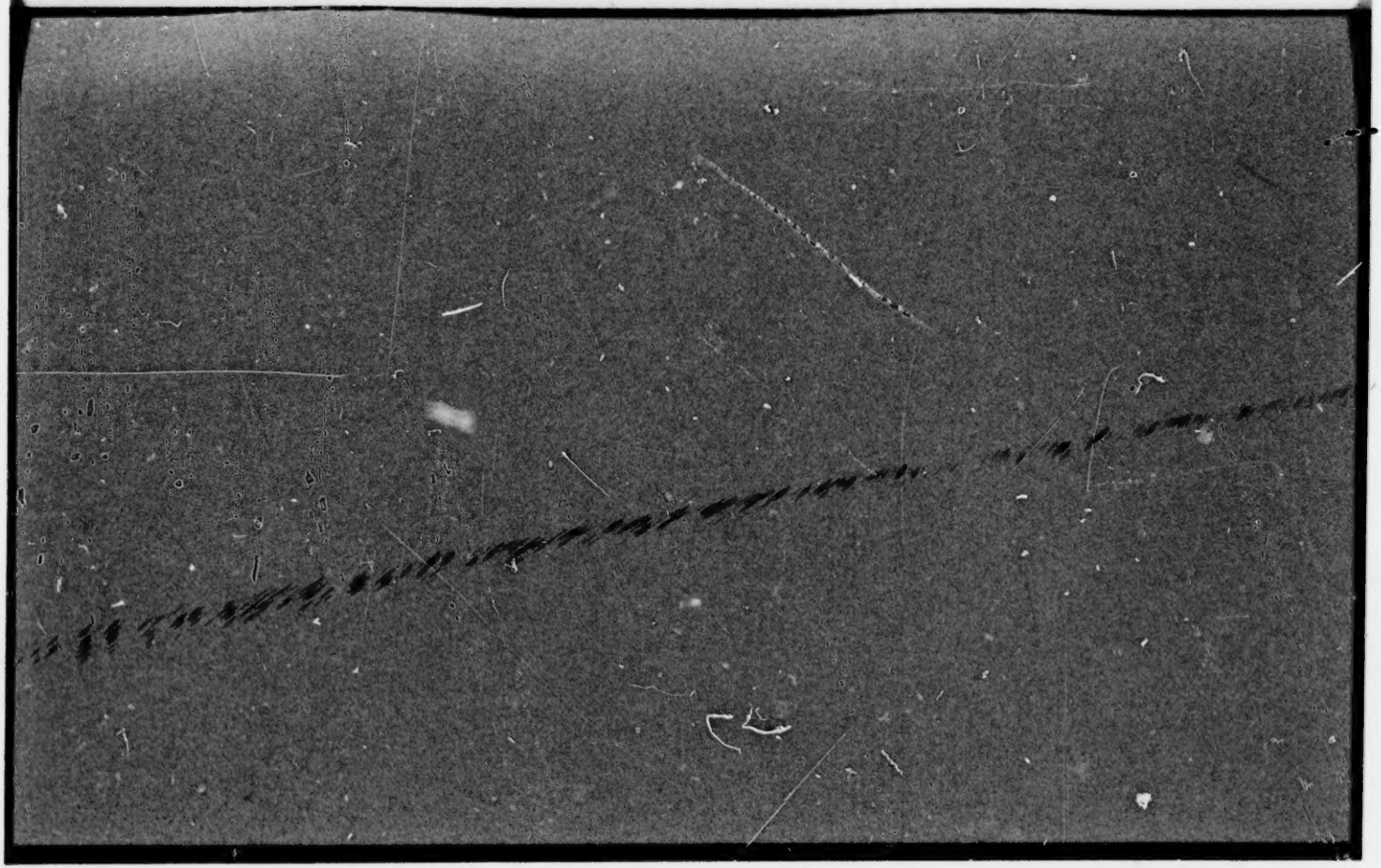

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

James D. Cox, former Assistant Director for Treatment, Division of Corrections, A.E. Slayton, Jr., former Superintendent of the Virginia State Penitentiary, W. K. Cunningham, Jr., former Director of the Division of Corrections, and Otis L. Brown, former Director of the Department of Welfare and Institutions, pray that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on July 12, 1974, a petition for a rehearing subsequently being denied by Memorandum and Order of September 17, 1974, in the case of *James Robert Cook* v. *James D. Cox, etc., et al.*

OPINIONS BELOW

The Memorandum of the United States District Court for the Eastern District of Virginia, Richmond Division, setting forth the basis for a potential recovery by respondent, who was the plaintiff in that action, is reported as *Cook* v. *Cox,* 357 F.Supp. 120 (E.D.Va. 1973) and is included herein as Appendix A (App. 1-12). The Judgment Order of the District Court, filed September 17, 1973, is not reported and is included herein as Appendix B (App. 13). The District Court did not enter a written opinion setting forth the grounds for denial of relief; however, the decision of that Court and the reasons for it are found at the end of the transcript of a hearing of September 17, 1973, and the relevant portion of that transcript pertaining to the decision is included herein as Appendix C (App. 13-15). The initial Memorandum Decision of the United States Court of Appeals for the Fourth Circuit, dated July, 12, 1974, is unreported and is included herein as Appendix D (App. 15-17). The Memorandum and Order of that Court of September 17, 1974, denying the Petition for a Rehearing also is unreported and is included herein as Appendix E (App. 18).

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Did The United States Court Of Appeals For The Fourth Circuit Err In Reversing The Order Of The District Court And Remanding The Case For Determination Of Whether The Respondent Was Deprived Of His Rights By Assignment To Solitary And Maximum Security Without Affording Respondent An Opportunity To Defend Himself, Where The Acts Of Which Which Respondent Complained Occurred During The Period Of 1968 To 1970, And The First Decision Setting Fourth Specific Requirements For Procedural Due Process Occurred In The Virginia District Court In 1971, Thereby Compelling The District Court To Apply Its Standards For Due Process Retroactively?

II.

Does The Prohibition Of Retroactive Application Of Due Process Rights Attendant To Prison Disciplinary Actions Preclude Expungement Of Prison Record Entries Of Disciplinary Actions Taken Before Such Rights Accrued?

STATUTES INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws; shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343(3)

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any

person: (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

STATEMENT OF THE CASE

The respondent here, James R. Cook, hereinafter referred to as Cook or plaintiff, brought this action in the United States District Court for the Eastern District of Virginia, Richmond Division, under 42 U.S.C. § 1983. Plaintiff Cook alleged that during the period of October 29, 1968, through April 27, 1970, he had suffered certain constitutional deprivations by the defendants directly or through their subordinates under color of State statute, regulation, custom or usage. Petitioners, hereinafter referred to by their individual names or as defendants, were employed in supervisory positions. Defendants Brown and Cunningham were respectively the Director of the Department of Welfare and Institutions and the Director of the Division of Corrections throughout the period of events in question. Defendant Cox served as Superintendent of Southampton Correctional Farm until August 1, 1969, when he became Superintendent of the Virginia State Penitentiary, a position he held throughout the remainder of the time in question here. Defendant Slayton was designated as the Pre-Release Center Superintendent until March 1, 1969, when he became Assistant Superintendent of the Virginia State Penitentiary, a position he also held throughout the remainder of the time in question.

The District Court impaneled a jury to make special findings of fact, and a trial was held on April 10 and 11,

1972. At the time of the trial the Court suggested and both parties agreed that the jury would be instructed to return a special verdict to establish the facts and that the issue of liability of the defendants would be developed in memoranda of law and a decision to be rendered later. The evidence in the District Court indicated that plaintiff Cook was placed in solitary confinement at the Virginia State Penitentiary on October 29, 1968, because of allegations that contraband had been found in his possession that had accompanied him upon his transfer a few days previously from the State Farm. There was no evidence that plaintiff had ever appeared before the officers, a Captain Ailor and a Mr. R. M. Oliver, then Assistant Superintendent of the Penitentiary who had made the decision to place the plaintiff in solitary. While in solitary confinement on or about November 20, 1968, an allegation was made that an unidentified prison guard struck plaintiff across the back. Plaintiff was admitted to the prison hospital, placed in an isolation cell there, and later transferred to Central State Hospital. On January 10, 1969, he returned to the Penitentiary and was sent to "B" cell.

During this period of time defendants, Cunningham and Brown occupied their positions, but defendants Slayton and Cox had not yet entered into supervisory positions at the Penitentiary. In May of 1969, when defendant Slayton was Assistant Superintendent of the Penitentiary, plaintiff Cook was confined in a regular cell in "C" building, the maximum security building at the Virginia State Penitentiary, by means of a procedure that the evidence indicated generally was the result of an administrative decision without a hearing in which a prisoner was present. In March of 1970, when defendant Cox was serving as Superintendent and defendant Slayton was Assistant Superintendent, plaintiff again was placed in solitary confinement by being removed

to the solitary confinement cells in the basement of "C" building. This punishment was allegedly the result of the finding of a hand fashioned handcuff key taped to plaintiff's body and found upon him prior to a habeas corpus hearing in the Circuit Court of the City of Richmond. There was no evidence that a hearing was ever held at which plaintiff was present concerning this alleged offense. On April 27, 1970, plaintiff Cook was released from this confinement and in September, 1970, he was returned to the Virginia State Farm where he has remained as an inmate.

In its verdict of April 11, 1972, the jury found that plaintiff Cook, while in solitary confinement, was struck across the back without justification by an unnamed agent, servant or employee of the Commonwealth of Virginia. The jury also found that plaintiff had been placed in solitary or in "C" building, without being informed of the reasons, or without being given the opportunity to confront those making accusations against him, without being given the opportunity to defend himself or seek assistance in defending himself against those charges which might have caused him to be placed in solitary or a "C" building cell. Additionally, the jury found that as a result of these acts plaintiff Cook had suffered mental damages but no physical damages.

After the submission of memoranda of law by counsel, the District Court issued the Memorandum Opinion reported as *Cook* v. *Cox*, 357 F.Supp. 120 (E.D. Va. 1973), contained in this petition as Appendix A. In that opinion the District Court addressed itself to the issues of whether plaintiff Cook was entitled to a jury for his money damage claim and what elements must be proven in order to hold the defendants liable. An additional issue of expungement of the records involved in the case was admitted by plaintiff's counsel in a memorandum of law submitted to the

District Court to be controlled by a prior decision of the District Court, *Daniels* v. *Brown*, Civil Action No. 307-69-R (E.D. Va. 1972), though counsel noted policy objection.

The District Court held that plaintiff Cook was entitled to proceed before a jury in regard to the issue of damages if he so chose and set forth the grounds for his recovery. The Court recognized that the question of whether the defendants personally engaged in conduct which caused constitutional deprivations still was left for determination and stated that an additional hearing would be held. The Court enunciated the standard for recovery by stating that, if Cook had been given his due process rights and would have received the same treatment, he could not recover from the defendants. The Court also stated that, if Cook would not have received the same treatment and if any of the defendants had personal knowledge of the treatment actually received and acquiesced in the same in regard to the beating and to the confinement in isolation and "C" cell, Cook might recover.

After plaintiff Cook had filed his original *pro se* complaint, the District Court had appointed counsel, William A. Pusey, Esquire, who was assisted by Daniel A. Carroll, Esquire, and Joseph M. Spivey, III, Esquire of the firm of Hunton, William, Gay & Gibson of Richmond, Virginia. Plaintiff Cook was not satisfied with counsel's efforts and petitioned the Court to have counsel removed. The District Court did so by order of July 26, 1973, and refused plaintiff's request for appointment of other counsel. A hearing was held on September 17, 1973, in regard to the remaining issues, and plaintiff Cook waived a jury. Plaintiff Cook did not proffer any further evidence in regard to the matter, and the Court dismissed the case on the grounds that there

was no evidence connecting defendants with the conduct involved. (App. B and C).

Plaintiff appealed to the United States Court of Appeals for the Fourth Circuit, and that Court reversed the District Court and remanded the case without the matter being scheduled for briefing and oral argument by Memorandum Decision of July 12, 1974. (App. D) The Court of Appeals did so on the grounds that the mere fact of plaintiff Cook's assignment to solitary as punishment and the record thereof, which was within the knowledge of some of the defendants, could have been a denial of his due process rights and further stated that the district court erred by dismissing the suit after no further evidence of damages was proffered, since plaintiff Cook could have been deprived of his rights without suffering monetary damages, and additionally he had sought expungement of certain entries in his prison record.

A subsequent Petition for a Rehearing *En Banc* was rejected by the Court of Appeals by Memorandum and Order of September 17, 1974. (App. E) This petition for a Writ of Certiorari ensued.

ARGUMENT

I.

This Honorable Court Should Grant A Writ Of Certiorari To Examine The Decision Of The United States Court Of Appeals For The Fourth Circuit, Because That Decision Commands The District Court To Determine Defendants' Liability In Light Of Due Process Requirements First Stated After The Acts In Question Occurred, Thereby Effectively Giving Retroactive Status To Such Requirements.

The United States Court of Appeals for the Fourth Circuit found that the District Court clearly was mistaken in

dismissing the suit, after plaintiff Cook presented no further evidence in the hearing of September 17, 1973, since the Court of Appeals found that there was evidence that the defendants, who were employed in supervisory positions, were aware of and ultimately responsible for the actual fact of confinement in maximum security or solitary, and since the jury had found that Cook had been placed there without the opportunity to defend himself, thereby suffering mental but no physical damages from the beating or the solitary confinement. While it is correct that the Distict Court did not expressly rule on the issue of the defendants' liability as a matter of law for plaintiff's confinement in maximum security or solitary, that Court did not hold defendants culpable for the failure to afford plaintiff the opportunity to defend himself. The Court dismissed the action, after finding that plaintiff Cook had not offered any evidence in support of a judgment against defendants, pursuant to *Bennett* v. *Gravelle*, 323 F. Supp. 203 (D. Md. 1971), *aff'd.* 451 F.2d 1011 (4th Cir. 1971), which held *respondeat superior* in applicable to cases brought under 42 U.S.C. § 1983. Your petitioners would submit that this action was entirely proper for the reason that a contrary result would hold defendants liable for acts of which they were unaware as in the case of the beating and new procedural rules in the case of the confinement.

Defendants, your petitioners here, urged in a Petition for a Rehearing that the decision of the Court of Appeals in reversing and remanding the case for a determination of whether Cook's rights were violated by his assignment to solitary and maximum security by virtue of the fact that plaintiff had not had the opportunity to defend himself, necessarily would give retroactive status to *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971), which first specifically stated in Virginia the due process rights guaran-

teed to inmates in prison disciplinary actions. Defendants in that petition called the attention of the panel to the recent decision by this Honorable Court, *Wolff* v. *McDonnell* in which Mr. Justice White, speaking for the majority, stated:

> "The question of retroactivity of new procedural rules affecting inquiries into infractions in prison discipline is effectively foreclosed by this Court's ruling in Morrissey that the due process requirements announced were to be 'applicable to *future* revocations of parole,' 408 U.S. at 490, 33 L. ed. 2d 484. . . ." See *Wolff* v. *McDonnell*, ... U.S. ....., 94 S.Ct. ..... 41 L. ed. 2d 935, 961 (1974).

Landman v. *Royster, supra*, was rendered in 1971, and the Court held that in order to discipline prisoners certain due process limitations on the authority of prisons to administer their systems were necessary. The Court stated for the first time exactly which procedures were required and among them was the right of an inmate to defend against the accusations made against him, including the right to cross-examine adverse witnesses and present evidence in defense before an impartial tribunal.*

Although there indeed had been prior litigation in Virginia relating to issues where due process was ancillary to the issues involved, the courts in Virginia had never prescribed specific requirements because the issue had never been directly raised. See *Landman* v. *Peyton*, 370 F.2d 135 (4th Cir. 1966). In the present case the evidence indicated that, although the actions of confinement had been

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* Your petitioners by way of note state that these requirements have been embodied in the Division of Corrections Guidelines since that decision and are in effect at present, although this Court has held in *Wolff, supra*, 41 L.Ed at 957-59, that the inmate is not entitled to confrontation and cross-examination and that the decision to permit such is left to the discretion of the prison disciplinary board.

taken within administrative operating procedures, the plaintiff Cook had never been allowed the opportunity to defend himself. The actions of which Cook complained occurred during the period of 1968-70 prior to *Landman* v. *Royster, supra,* yet the Fourth Circuit clearly held the standard enunciated by that case, the opportunity to defend, as attaching to Cook in the years prior to the decision.

The Court rejected defendants' contention that the order reversing and remanding would involve retroactive application of due process standards. The position of the Fourth Circuit was that this Honorable Court's decision in *Wolff, supra,* might provide a basis for modification of *Landman,* but to the extent *Landman* was consistent, defendants had been on notice since 1971 of the procedures for minimum due process, and the Fourth Circuit panel stated that the decision in the case at bar involved no retroactive application of *Wolff, supra.*

This decision gives rise to the two possible interpretations, both of which your petitioners here object. Firstly, the Fourth Circuit would appear to state that the due process standards set forth in *Wolff, supra,* shall apply hereafter and shall not be given retroactive status, but that the due process standards in *Landman* v. *Royster, supra,* consistent with *Wolff* shall. Petitioners submit that this actually does apply the standards of *Wolff* retroactively, and further reject such a narrow and restrictive view of the concept of retroactivity which would hold your petitioners to standards in 1968-70, stated in 1971. The language of *Wolff* indicates that due process standards in prison disciplinary infraction cases should not be applied retroactively as distinguished from criminal proceedings where more is at stake, because "great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country and the reliance

prison officials placed in good faith on prior law not requiring such procedures." *Wolff, supra,* 41 L.Ed.2d at 961. In considering the number of cases involved, the burden on the Federal courts and prison systems, and the reliance of prison officials on previously valid procedures as balanced against the nature of the error, the majority of this Court rejected retroactivity. Your petitioners would submit that this principle should be validly applied to all due process cases enunciating similar standards such as *Landman.*

A second interpretation of the Fourth Circuit's reversal without briefing or argument either in the initial Memorandum or the Memorandum and Order denying the petition would be that that Court overlooked the fact that the acts of which plaintiff Cook complains occurred prior to *Landman* v. *Royster, supra,* even though that was clear from the record before the Court and from the Petition for Rehearing. The effect of such an error is that retroactive status for due process procedure in prisons is subject to great confusion in the states, including Virginia, which are within the jurisdiction of the Fourth Circuit.

For the same reason as in *Wolff, supra,* the issue presented here raises substantial questions concerning the administration of a prison system. Your petitioners urge that this case is appropriate for the granting of certiorari. The scope of the concept of retroactivity is an issue here, and the states within the Fourth Circuit are bound by that Circuit's restrictive interpretation. The law in the Fourth Circuit would appear to be that, although due process standards under *Wolff, supra,* are not retroactive, lower court determinations of due process rights within prison discipline situations are. Your petitioners submit that this is clearly an error and that this Honorable Court should grant a Writ of Certiorari for the purpose of defining retroactivity in the context of factual situations such as this.

II.

The United States Court Of Appeals For The Fourth Circuit Erred Further In Reversing And Remanding On The Additional Grounds That, Since Plaintiff May Have Been Deprived Of Rights Without Suffering Monetary Damages, And Since Plaintiff Sought Expungement Of The Entries Reflecting His Confinement In His Prison Records, The District Court Erred In Dismissing The Suit.

This question of retroactivity in *Wolff* was brought before this Court because the Ninth Circuit had applied due process standards so as to effect expungement.

> "The Court of Appeals held that the due process requirements in prison disciplinary proceedings require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged. We disagree and reverse on this point." 41 L.Ed.2d at 961.

Plaintiff Cook's complaint asked for relief in the form of damages and expungement of the records. As the panel has validly stated, Cook could have been deprived of his rights without suffering money damages. However, your petitioners contend that expungement of the record was also properly denied by the District Court, and implicitly so when it dismissed the action. Your petitioners contend that expungement also is controlled by *Wolff* v. *McDonnell, supra.*

Consistent with this, the court below in a previous decision, *Daniels* v. *Brown*, No. 307-69-R (11/1/72), held that the use of such record by either the Classification Committee or the Parole Board could have relevance as to Cook's attitude or security status in the same manner as unproven charges. *West* v. *Cunningham*, 456 F.2d 1264 (4th Cir. 1972), does not require a different result, since

that case merely set forth the standard for determination as whether any prejudice to inmates could be expected to flow from retention of the records. No issue was presented that the existence of these records had in any way prejudiced Cook. Therefore, your petitioners believe that the District Court was correct in denying relief on this ground, when it dismissed the action, and that relief is further precluded by *Wolff* v. *McDonnell, supra.*

Your petitioners again urge this Court to grant certiorari because the holding of the panel is in conflict with the decision of this Honorable Court in *Wolff* v. *McDonnell, supra.* This is not a case where petitioners are merely unhappy with the prospect of relitigating these issues, but rather this is a case which goes to the essence of the concept of retroactivity by raising the spectrum of a separate and inconsistent interpretation in the Fourth Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted and the judgment in this case reversed.

Respectfully submitted,

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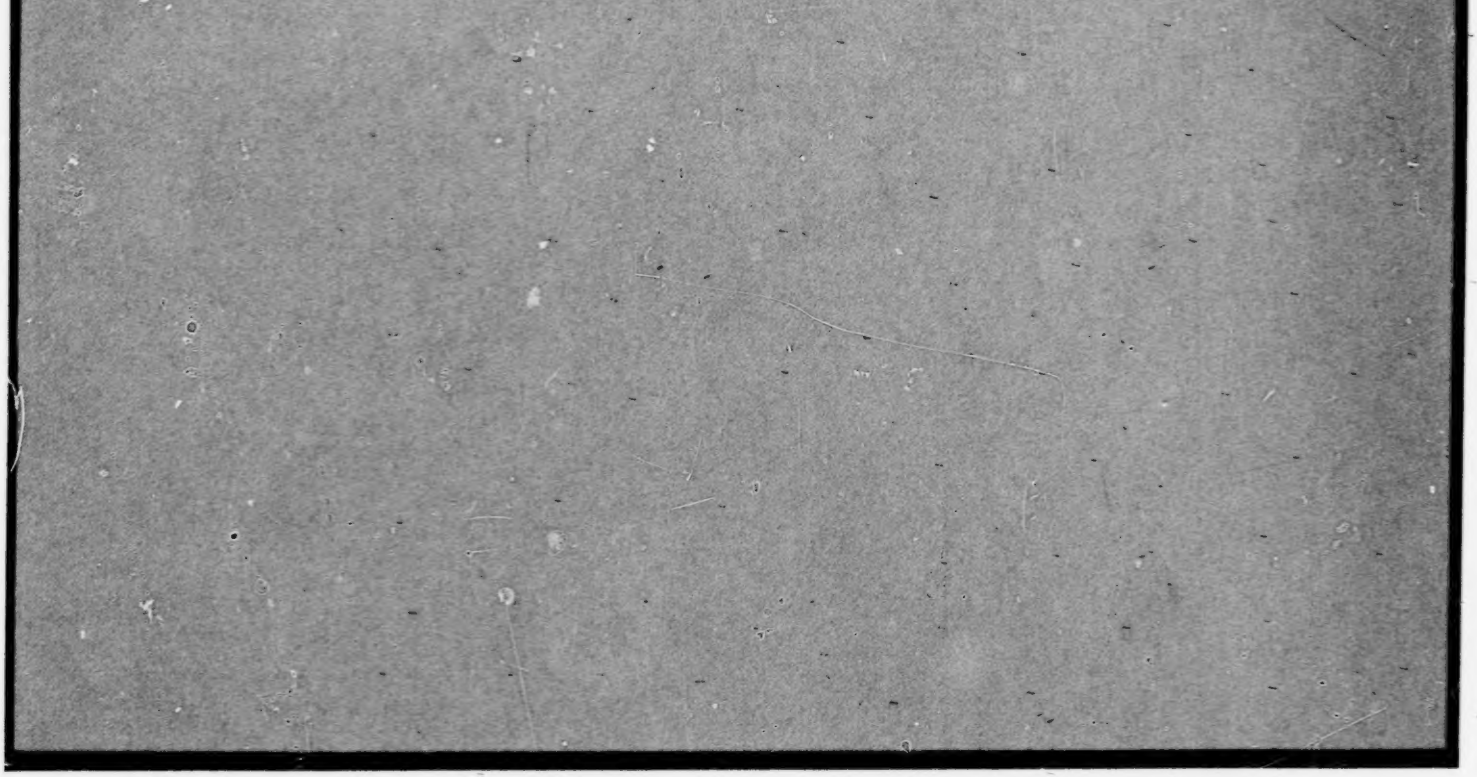
CERTIFICATE OF SERVICE

I, Burnett Miller, III, Assistant Attorney General of Virginia, co-counsel for James D. Cox, etc., et al., in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 13th day of December, 1974, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to James R. Cook, No. 90933, Virginia State Farm, State Farm, Virginia, 23160, and Collins Denny, III, Esquire, P. O. Box 1122, Richmond, Virginia, 23208, who has been appointed counsel by the United States District Court for the Eastern District of Virginia, Richmond Division, for proceedings in that Court upon remand of the matter by the United States Court of Appeals for the Fourth Circuit.

BURNETT MILLER, III
Assistant Attorney General

APPENDIX



APPENDIX A

MEMORANDUM

Filed April 16, 1973

James Cook, a Virginia prisoner, seeks redress from the defendant prison officials for alleged constitutional deprivations suffered while he was incarcerated in the state penitentiary. Jurisdiction is attained by virture of 28 U.S.C. § 1343, 42 U.S.C. § 1983. The parties are presently before the Court pursuant to plaintiff's motion for a hearing. Because of the peculiar history of this litigation, however, the Court finds this matter ripe for summary judgment. The issues appurtenant thereto have been fully briefed by counsel in memoranda before the Court. It is upon same, and the records before it, that the Court deems this matter ready for disposition.

Cook brought this action *pro se* against J. D. Cox, then Superintendent of the Virginia State Penitentiary, on April 21, 1970, alleging that he was unconstitutionally confined to isolation (solitary confinement) and padlock on several occasions and that he had been beaten by an unnamed prison guard without reason. Counsel was appointed for Cook on June 30, 1971, when it appeared that controverted issues of fact and law existed on the record before the Court. On September 22, 1971, plaintiff submitted his demand, by counsel for jury trial of the factual issues raised. On March 21, 1972, the Court granted defendant Cox's motion of March 22, 1972, for a more definite statement of claims. On March 31, 1972, Cook, by counsel, filed an amended complaint naming as additional party defendants A. E. Slayton, Superintendent of the Virginia State Penitentiary; W. K. Cunningham, Director of the Division of Corrections; and Otis Brown, Director of the Depart-

ment of Welfare and Institutions. The amended complaint alleged the following constitutional deprivations:

1. Cook was placed in isolation without notice of charges or of duration of confinement on October 29, 1968.

2. On November 20, 1968, while in isolation, Cook was attacked without provocation by an unnamed prison guard and subsequently not given medical treatment therefor.

3. On May 28, 1969, Cook was placed in C-cell (maximum security) without a hearing.

4. On March 27, 1970, Cook was again placed in isolation without a hearing or notice of charges.

Relief prayed for included money damages and a prayer for expunction of the records of these confinements from Cook's prison records.

This action went to trial before a jury on April 10 and 11, 1972. Because several of the preliminary legal issues raised, including that of whether Cook was entitled to a jury, were not determined, counsel agreed, upon the Court's suggestion, that the jury should be instructed to return a special verdict to establish the facts and that the issue of liability for damages would be developed in memoranda of law to be submitted to the Court. The jury's verdict read as follows:

VERDICT

> Was Mr. Cook, while in solitary confinement, struck across the back without justification, by an agent, servant or employee of the Commonwealth of Virginia? Answer "Yes" or "No." YES
>
> Was Mr. Cook, on any occasion, ever placed in solitary confinement or in C-Building without being informed

of the reasons therefor, or without being given an opportunity to confront those making accusations against him, or without being given an opportunity to defend himself or seek assistance in defending himself against those charges which might have caused him to be placed in solitary confinement or in a C-Building cell? Answer "Yes" or "No." YES

If you answered either of the foregoing questions "Yes" do you find that Mr. Cook has suffered any damages whatsoever as a result of the acts mentioned therein, that is, the beating or being placed in solitary confinement or in the C-Building. Answer "Yes" or "No."

[Written by Foreman (1) Physical Damage No

(2) Mental Damage Yes]

/s/ John A. Passeri, Jr.
Foreman

Dated: 4-11-72

A subsequent motion for judgment N.O.V. of April 27, 1972, by the defendants was denied by the Court for the reason that said motion was untimely. On September 29, 1972, the Court solicited memoranda from counsel on the issue of whether the plaintiff is entitled to recover damages from the plaintiff. That issue, as well as procedural issues raised with respect to the further prosecution of this action, are now before the Court. Accordingly, the Court will proceed with this matter by determination of the following issues:

1. Is Cook entitled to a jury?

2. What elements must be proven in order to hold the defendants liable?

App. 4

1.

The Seventh Amendment guarantees the right of jury trial to suits at common law.[1] The few courts that have considered the issue have split on the question of whether a § 1983 suit is one "at common law." See., e.g., *Lawton* v. *Nightingale*, ... F. Supp. ....., 41 L.S. 2041 (N.D. Ohio, Jun. 27, 1972) (holding it isn't) and *Harkless* v. *Sweeny Independent School District*, 278 F. Supp. 632 (S.D. Texas 1968), rev'd. on other grounds, 427 F.2d 319 (5th Cir. 1970) (holding in effect it is). In the Court's opinion, the issue properly turns on a determination of whether § 1983 is a jurisdictional type statute which merely places a traditional type claim[2] involving state action within the framework of federal jurisdiction,[3] or whether the section creates a special statutory claim independent of common law. If the former, a § 1983 action seeking money damages is in essence a tort action, which is "legal" in nature, to which the right to jury trial directly attaches. See *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962). If the latter, a § 1983 claim is a special action to which other analysis, infra, may be applied. See *Lawton* v. *Nightingale, supra.*

The Court concludes that the latter position is correct, that is, that § 1983 creates a separate federal right. Support for this view is found in *Monroe* v. *Pape*, 365 U.S. 167, 195 (1961) (Harlan, J., concurring):

---

[1] Rule 38(a), F.R.C.P., preserves the right of jury trial as declared by the Seventh Amendment or as given by statute. Section 1983 itself does not provide for jury, necessitating an examination of the effect of the Seventh Amendment.

[2] The claim may arguably be in equity if an injunction or other equitable relief is sought or in law if money damages are sought.

[3] Technically jurisdiction lies pursuant to 28 U.S.C. § 1343 and its predecessors dating from 1875. See *Hague* v. *CIO*, 307 U.S. 496, 518 (Stone, J. concurring) (1939).

Since the suggested narrow construction of § 1983 presupposes that state measures were adequate to remedy unauthorized deprivations of constitutional rights and since the identical state relief could be obtained for state-authorized acts with the aid of Supreme Court review, this narrow construction would reduce the statute to having merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings in cases involving authorized action. Such a function could be justified on various grounds. It could, for example, be argued that the state courts would be less willing to find a constitutional violation in cases involving "authorized action" and that therefore the victim of such action would bear a greater burden in that he would more likely have to carry his case to this Court, and once here, might be bound by unfavorable state court findings. But the legislative debates do not disclose congressional concern about the burdens of litigation placed upon the victims of "authorized constitutional violations contrasted to the victims of unauthorized violations. Neither did Congress indicate an interest in relieving the burden placed on this Court in reviewing such cases.

The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a

> common-sense matter, is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings.
>
> (Footnote omitted)

Additionally, the majority opinion, 365 U.S. at 180, after reviewing the legislative history concludes:

> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

The United States Court of Appeals for the Fourth Circuit has given similar interpretation to § 1983 as a separate statutory cause of action. In *Almond* v. *Kent*, 459 F.2d 200, 203 (4th Cir. 1972), the Court stated:

> We agree that, to the extent that Almond's § 1983 complaint alleges a violation of his constitutional rights resulting in personal injuries of the type that would be actionable at common law, the Virginia two-year period unquestionably applies. But this is so, not because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten. We think it follows that the Virginia two-year period applies to all other rights which may be redressed under § 1983 by the recovery of money damages. Section 1983 creates a federal cause of action, unknown at common law, "[for] the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws [of the United States] . . ." This right of recovery depends upon federal considerations, and it is not one which is concerned with the archaic concepts of survivability of the common law.
>
> * * *
>
> In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from "personal injuries."
>
> (Citations omitted)

The disassociation of § 1983 from common law is clearly imparted by the above-quoted language. That conclusion, however, is not finally dispositive of the issue. Although it is clear that a § 1983 suit for money damages is not a common law tort suit in new jurisdictional clothing, it still remains to be determined whether the Seventh Amendment right to jury trial attaches to the section as a federal statutory claim. *Simmons* v. *Avisco*, 350 F.2d 1012 (4th Cir. 1965).

The general rule in this context is that "if a new cause of action is created by Congress, and nothing is said about the mode of trial, the courts must look to the nearest historical analogy to decide if there is a right to a jury." 9 Wright & Miller, *Federal Practice & Procedure*, § 2302 (1971). See *Simler* v. *Conner*, 372 U.S. 221 (1963); *Ochoa* v. *American Oil Co.*, 338 F. Supp. 914 (S.D. Tex. 1972). While this historical inquiry appears unnecessary with respect to statutory proceedings under federal law, see *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937), the

approach has been treated as one of constitutional magnitude with respect to new causes of action, for

> To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. *United States* v. *Jepson*, 90 F. Supp. 983, 986 (D. N.J. 1950). See also, *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962).

The resultant search for historical analogy has been apologized for because of its "reek . . . of the study," *Damsky* v. *Zavalt*, 289 F.2d 46, 48 (2d Cir. 1961), and criticized for what has been termed its more proper reek "of the museum." *Damsky*, *supra*, at 59 (Clark, J., dissenting). See Wright and Miller, *supra*. Although the Supreme Court has alleviated some of the onerous nature of this inquiry in *Dairy Queen*, *supra*, and in *Beacon Theaters* v. *Westover*, 359 U.S. 500 (1959), by making clear that the search must concern itself with the basic nature of the claim asserted rather than the historical procedures utilized to litigate it, the Court is nevertheless satisfied that federally created causes of action must be examined within the purview of the Seventh Amendment.

Turning then to Cook's present money damage claim, the Court has no doubt that the analogy of the cause of action asserted here is a claim in tort.[4] Accordingly, the right of jury trial attaches.

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[4] Further definition, for example whether or not this is a trespass to the person, is unnecessary, as the historical examination includes years prior to 1938, at which time law and equity actions were merged under the federal rules. See Wright & Miller, *supra*.

The Court notes that the language of § 1983 lends itself to this type of analysis: The section provides that the wrongdoer thereunder "shall be liable to the party injured in an action at law, suit in equity or other proper proceeding of redress." While legislative history on this language is not helpful, it is a fair inference that the Congress envisioned this section with an eye to creating a federal cause of action, which could be prosecuted in the usual forms of litigation, rather than the creation of a new type of proceeding.

The Court reaches this conclusion with severe misgivings. These have been well stated in *Lawton* v. *Nightingale, supra*, 41 L.W. 2041:

> If a jury could be resorted to in actions brought under this statute, the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views.

While this problem may not arise in § 1983 actions seeking only injunctive relief, it nevertheless lurks ominously behind every suit for money damages under § 1983.

Additionally, legislative history reveals that the Congress was motivated in part to pass the act by what it viewed as a failure of southern juries to justly consider the claims of Negro litigants in state courts. See *Monroe* v. *Pape, supra*, 365 U.S. at 177, et seq.; Cong. Globe, 42d Con. 1st Sess. at 334, 505. The Court has no doubt that today's juries are more openminded,[5] and hence must at this stage, absent contrary guidance from its appellate courts, content itself in the conclusion that the Constitution contemplates that persons seeking monetary relief in actions at law must carry their burden to a jury if either of the parties so demands. It is the fundamental nature of that right which the Supreme Court has found to be pervasive in its *Beacon Theater* and *Dairy Queen* decisions.

II.

The immediate impact of this conclusion upon Cook is that he has the right to proceed with his damage claims to

[5] See, Note, 52 Va. L.R. 1069 (1966) on developments in combatting jury discrimination.

the jury.[6] In the hope of delimiting the scope of that effort, the Court will set forth the elements which he must prove to gain recovery.

In support of his position, Cook urges the Court to depart from numerous precedential holdings with regard to liability under § 1983. Among those holdings are the existing rules that the defendants are not liable in their official capacities by virtue of the Eleventh Amendment, and that *respondeat superior* does not apply under this section. This Court cannot do so for reasons stated in *Landman* v. *Royster*, ... F. Supp. ....., C.A. 170-69-R (E.D. Va. Jan. 31, 1973), duty-bound as it is to follow the rulings of its appellate court. Cook's arguments of this nature should more properly be addressed to appellate courts.

The Court has fully discussed the question of liability under § 1983 in *Landman, supra*, so that a succinct summary will serve for these purposes.

A. Liability in Official Capacity.

Damages may not be recovered against the defendants in their official capacities as a judgment against them as such would in essence be a judgment against the state. Recovery in that manner is proscribed by Monroe v. Pape, supra, 365 U.S. 167, and the Eleventh Amendment.

B. Personal Liability.

A *prima facie* claims for damages may be made by proving that the conduct complained of was engaged in under color of state law and that such conduct subjected the plaintiff to a deprivation of constitutional rights. Both these elements are supported factually by the verdict of the jury

[6] Concomitantly, the Court is precluded from its own fact finding with respect to the open issues upon the records before it.

upon the first trial and by this Court's conclusions of law in *Landman,* 333 F. Supp. 621 (E.D. Va. 1971) and No. 170-69-R (Jan. 31, 1973). Still open for jury determination is the question of whether the defendants personally engaged in conduct which caused constitutional deprivations.

Said conduct cannot be attributed to the defendants by virtue of *respondeat superior.* Rather the defendants must have actual knowledge of the challenged actions of his subordinates and acquiesce in them. Proving same is, as a matter of practicality, easier if the plaintiff can show a pattern of close supervision by the defendants and that the acts themselves complained of were part of a consistent pattern of conduct of the subordinates. In that event, it would be logical and proper to assume acquiescence and knowledge of the defendants absent a specific showing to the contrary.

Additionally, it should be noted that damages must be proven to arise from the constitutional deprivations, not from the conduct itself. This distinction takes on meaning when examined in the setting of *Landman, supra* (Jan. 31, 1973). Plaintiffs Landman, Wansley and Mason gained recovery because it was shown that defendant Cunningham's actions in this respect was motivated by a personal animus. Absent same, the record is clear that these three prisoners would not—had their due process rights been preserved—have been subjected to the treatment they received. Plaintiffs Hood and Arey did not recover because the Court found that their treatment resulted from their own misbehavior, that is, that even had they been afforded due process, their incarceration in the manner challenged would likely have resulted anyway. The Court does not state here that animus on the part of the defendants is a necessary element of personal conduct to be proved, but rather that damages for treatment improper by virtue of lack of due

process procedures can only be probed upon a showing that such treatment would not have flowed to a prisoner given his due process rights. In the cases of Landman, Wansley and Mason the Court concluded that their treatment, but for the animus of defendant Cunningham, would have been different.

Applying these principles to the present case, the following controverted issues of fact remain:

1. Would Cook, had he been given his due process rights, have received the same treatment? If the answer is yes, Cook may not recover of the defendants.

2. If Cook would not have received the same treatment, did any of the defendants have personal knowledge of the treatment actually received and acquiesce in same? This inquiry must be directed with respect to the beating and to the confinements in isolation and C-cell. If the answer is no, then Cook may not recover.

3. If the answer to (2) is yes, what is the measure of damages?

For the reason stated *supra*, Cook has a right to present these questions to a jury. The Court will treat these outstanding controverted issues as issues of fact to be decided pursuant to a motion for summary judgment and accordingly will direct a jury trial with respect to same in accordance with Rule 56(d), F.R.C.P. Should Cook choose to waive a jury, the Court will give further consideration to this matter in such manner as the Court and the parties deem appropriate.

An order shall issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Dated: April 16, 1973

APPENDIX B

JUDGMENT

Filed September 17, 1973

This action came on for (hearing) before the Court, Honorable Robert R. Merhige, Jr., United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, and the defendants, James D. Cox, Assistant Director for Treatment, Division of Corrections, A. E. Slayton, Jr., Superintendent of the Virginia State Penitentiary, W. K. Cunningham, Jr., Director of the Division of Corrections and Otis Brown, former Director of the Department of Welfare and Institutions, recover of the plaintiff, James Robert Cook, their cost of action.

Dated at Richmond, Virginia, this 17th day of September 1973.

W. Farley Powers, Jr.
Clerk of Court

By: /s/ .....
Deputy Clerk

APPENDIX C

[19] * * *

The Court: No, we are not going to spend any more time on it. You can appeal if you dislike the Court's ruling.

This matter comes before the Court on a scheduled [20] hearing in response to the remaining issues in this case which were, in effect, whether Mr. Cook could present evidence that the defendants Cunningham, Cox, Slayton, and Brown were personally involved and that they had that

personal involvement as required under the law of this circuit before they could be held liable in a 1983 case.

A jury has already determined that Mr. Cook had been placed in confinement in C Building without being informed of the reasons therefor or without being given an opportunity to confront those making accusations against him, or without being given an opportunity to defend himself or seek assistance in defending himself against those charges which might have caused him to be placed in solitary confinement or in C Building.

That jury also found Mr. Cook had suffered damages as a result of the acts mentioned, that is, an alleged beating or being placed in solitary confinement or in the C Building.

The jury's finding to that extent was that there were no physical damage, but there was mental damage.

The Court finds from the jury's findings and from the evidence the Court heard, that there was a physical contact between Mr. Cook and certain of the guards. There is not a scintilla of evidence involving Mr. Cunningham, Mr. [21] Cox, Mr. Slayton, or Mr. Brown.

The Court had appointed counsel for Mr. Cook. Mr. Cook moved that the counsel, in effect, be relieved. He was not satisfied with counsel's efforts, he has stated here today.

The Court relieved counsel and refused to appoint other counsel.

The burden on the bar has been tremendous in these prison cases, and it was tremendous on the firm of Hunton, Williams, Gay, and Gibson in this case.

I am not going to impose on the bar unless I think it is absolutely necessary in the interests of justice.

The Court set this hearing for today to ascertain whether or not Mr. Cook actually had any other evidence he wished to offer. The Court is satisfied that Mr. Cook does

not have any evidence he can offer in support of what is required under the law to effect a judgment against any of the named defendants pursuant to *Bennett* v. *Gravelle*, 451 F.2d. 1011, a Fourth Circuit case, 1971, which holds respondeat superior is inapplicable in 1983 cases.

Accordingly, for the reasons assigned, judgment will be entered for all of the defendants in this case.

The case stands dismissed.

Thank you, gentlemen.

APPENDIX D

MEMORANDUM DECISION

Filed July 12, 1974

James Robert Cook, a prisoner at the Virginia State Penitentiary, appeals the order of the district court granting judgment for the defendants in Cook's § 1983 action. We reverse.

In his complaint, Cook alleges that on several occasions he was placed in solitary and confined under maximum security conditions without due process, and that he had been beaten by a guard. Cook asserts that he suffered mental and physical injury from both the unconstitutional confinement and the beating. Cook seeks monetary damages and expungement from his prison record of all references to his assignment to solitary and maximum security. Defendants are state corrections officials who at the relevant times were either in charge of the state penitentiary or had general responsibility over Virginia prisons.

The district court appointed an attorney to represent Cook. A jury empaneled to make special findings of fact found that Cook was beaten by a guard, that he was confined in solitary or maximum security without being informed of the reasons or without being given an oppor-

tunity to defend himself, and that as a result of such beating or confinement Cook suffered mental but no physical damages. These findings were accepted by the court. The district court held, however, that Cook would still have to show that the defendants had personal knowledge of conduct which unlawfully deprived Cook of his rights.[1]

A hearing was held to determine whether Cook had any evidence to present on the issue of defendants' knowledge.[2] At the hearing, the judge below stated that if Cook had any evidence he could go before a jury or have another judge hear the evidence. Finding, however, that there was "not a scintilla of evidence involving" the defendants, the court granted judgment for the defendants.

The district court was clearly mistaken in its conclusion that there was no evidence to connect the defendants to conduct which allegedly deprived Cook of his federal protected rights. Defendants' own uncontroverted testimony and exhibits show that at least some of the defendants were aware of and responsible for Cook's confinement in solitary and maximum security without affording him an opportunity to defend himself.

Apparently the district court concerned itself only with the issue of whether Cook had evidence to implicate the defendants in his beating; and when it concluded that he had none, granted judgment for defendants. However, the jury's

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[1] The district court properly held that defendants could not be held liable on the theory of respondent superior. See Bennett v. Gravelle, 323 F.S. 203, 214 (D. Md.), aff'd. 451 F.2d 1011 (4 Cir. 1971); Jennings v. Gains, 476 F.2d 1271, 1274 (8 Cir. 1973). This does not, however, necessarily foreclose the possibility that a supervisory official without knowledge of the particular conduct of a guard, could be held directly liable for his own failure to properly supervise. Cf. Landman v. Peyton, 370 F.2d 135, 140-41 (4th Cir. 1966).

[2] Prior to the hearing, Cook expressed dissatisfaction with his attorney and the court released counsel. Cook proceeded pro se after the court refused to appoint another attorney.

findings that Cook suffered mental damages were not based *solely* on the fact of Cook's beating. The jury found that Cook was damaged as a result of the beating *or* the solitary confinement.

In any case, the element of damages is not a necessary condition to establishing a claim under § 1983. Cook may have been deprived of his rights without suffering monetary damages. See Sexton v. Gibbs, 327 F.S. 134, 142 (N.D. Tex. 1970), aff'd. 446 F.2d 904 (5th Cir. 1971), cert. denied, 404 U.S. 1062. In the instant case, Cook seeks expungement of certain entries in his prison record. Thus, while the conditions of his confinement in solitary (of which the defendants may or may not have been aware) are relevant to the measure of damages, the mere fact of Cook's assignment to solitary as punishment and the record thereof (clearly within the knowledge of some of the defendants) could have been a denial of Cook's due process rights.

Accordingly, we reverse the order of the district court and remand this case for a determination of whether Cook was deprived of his rights by his assignment to solitary and maximum security; and if Cook's rights were violated, to determine which of the defendants were responsible and to fashion an appropriate remedy. Since the remaining factual and legal issues are likely to be complex and require the assistance of counsel for their proper presentation, the district court shall appoint counsel to represent Cook.

/s/ Harrison L. Winter
United States Circuit Judge

/s/ J Braxton Craven, Jr.
United States Circuit Judge

/s/ John D. Butzner, Jr.
United States Circuit Judge

APPENDIX E

MEMORANDUM AND ORDER

Filed September 17, 1974

In seeking rehearing in banc, appellees suggest that the decision of the panel is in conflict with Wolff v. McDonnell, ... U.S. ..... (June 26, 1974), which held that the rules it prescribed should not be applied retroactively. We disclaim that interpretation of the panel's decision. The fact is that since Landman v. Royster, 333 F.S. 621 (E.D. Va. 1971), a decision which appellees' predecessors in interest did not appeal, Virginia prison authorities were directed to respect certain minimum standards of procedural due process of law therein prescribed in regard to the administration of discipline within prisons. See also Landman v. Royster, 354 F.S. 1292 (E.D. Va. 1973); and Landman v. Royster, 354 F.S. 1302 (E.D. Va. 1973).

To the extent, if any, that *Landman* prescribes more rigorous standards of procedural due process than are required by *Wolff*, the decision in *Wolff* would provide a basis for modification of *Landman*. But to the extent that *Landman* is consistent with *Wolff*, appellees have, since October 30, 1971, been on notice of minimum due process requirements. The panel's decision in the instant case will involve no retroactive application of *Wolff*.

A majority of the judges entitled to vote thereon having voted against rehearing in banc, it is, with the concurrence of Judge Craven and Judge Butzner, Ordered that the petition for rehearing is denied.

For the Court:

/s/ Harrison L. Winter
United States Circuit Judge